STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE L. GARCIA-MANDUJANO,

Defendant-Appellant.

Supreme Court No.:

Court of Appeals No. 324963
Lower Court Case No. 14-19392-FC

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APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

DATED: May 10, 2016

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM AND DATE OF ENTRY

Defendant appeals the denial of his Motion for New Trial and *Ginther* Hearing entered on July 22, 2015, the Judgment of Sentence entered on October 27, 2014, all adverse rulings and orders arising from the jury verdict of guilty on one count of criminal sexual conduct in the first degree, and the Court of Appeals Opinion dated March 15, 2016. Defendant was sentenced to 25 to 38 years on the one count of criminal sexual conduct in the first degree, with the prosecutor entering a nolle prosequi of the criminal sexual conduct count in the second degree with prejudice.

GROUNDS FOR APPLICATION FOR LEAVE TO FILE APPEAL TO THE SUPREME COURT

The decision of the Court of Appeals was clearly erroneous and will cause material injustice to the Defendant. The Court of Appeals erred in holding that defense counsel employed a defense strategy at trial in failing to call key defense witnesses, who could testify as to the crowded living conditions in the small single-wide mobile home trailer where the crime of criminal sexual penetration allegedly occurred. The decision of trial counsel not to call the numerous potential defense witnesses, all of whom were living in the trailer at the time of the alleged crime, was not a strategic decision, but an abdication of his duty to investigate potential exculpatory defenses. Trial counsel's complete failure to interview any of the witnesses before making any judgment not to call them fell below an objective standard of reasonableness under the prevailing professional norms.

Reasonable professional judgments did not support the limitation on investigation on interviewing of key defense witnesses who were physically present at the scene of the crime.

In addition, trial counsel's failure to call one key witness, Alicia Garcia, also fell below the standard of professional norms as that witness would have contradicted the victim's testimony that she was raped on Alicia Garcia's bed and might have left blood on the linens. Ms. Garcia would have testified that there was no blood ever found on her bed linens following the alleged sexual assault. All of the witnesses would have contradicted the victim's testimony that no one was at home at the time the attack occurred as there were numerous family members in the small trailer virtually around the clock during the narrow time frame during which the attack was alleged to have occurred.

The Court of Appeals was also clearly erroneous in finding that it was a "strategy" of trial counsel not to interview the examining Physician's Assistant of the victim before she testified

before the prosecution. Ignoring even the prosecutor's description of trial counsel as making a "huge mistake" in not interviewing this witness before she testified, the Physician's Assistant clearly surprised trial counsel by stating on several occasions during cross examination that she could "easily" fit an adult speculum into the 12 year-old victim. The Physician's Assistant found this highly unusual and was the only clear physical evidence referred to in the case, causing prejudicial harm to the defense. The neglect of trial counsel to interview the assistant was not a matter of trial strategy, but one of neglect born of a purely speculative fear, made after the fact, that the physician's assistant would not talk to him, even though the doctor-patient privilege had already been waived. In addition, trial counsel failed to object to hearsay testimony from the physician's assistant identifying the defendant, even though an investigation by law enforcement had already commenced.

For the reasons set forth in this Application, the prosecutor failed to produce sufficient evidence to support a verdict beyond reasonable doubt and that the great weight of the evidence failed to establish guilt beyond a reasonable doubt that defendant committed criminal sexual conduct in the first degree.

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STATEMENT OF QUESTIONS

WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO CALL DEFENSE WITNESSES WHOSE TESTIMONY COULD HAVE CREATED A REASONABLE DOUBT THAT SEX ACTS BETWEEN THE DEFENDANT AND COMPLAINANT OCCURRED IN A CROWDED SINGLE-WIDE TRAILER?

The Defendant-Appellant Answers the question "yes"
The Plaintiff- Appellee answers the question "no"
The Trial Court answered the question "no"

WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO INTERVIEW A KEY MEDICAL WITNESS RESULTING IN PREJUDICIAL EVIDENCE TO BE HEARD BY THE JURY?

The Defendant-Appellant Answers the question "yes"
The Plaintiff- Appellee answers the question "no"
The Trial Court answered the question "no"

WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE HEARSAY TESTIMONY OF THE PHYSICIAN'S ASSISTANT IDENTIFYING DEFENDANT AS THE PERPETRATOR?

The Defendant-Appellant Answers the question "yes"
The Plaintiff- Appellee answers the question "no"
The Trial Court answered the question "no"

I. STATEMENT OF FACTS

A. Facts at Trial Pertaining to the Charge of First Degree Criminal Sexual Conduct

The complainant testified that an act of penis to vagina penetration occurred in January, 2013. TI 110-111, 146-147, 186; TII 61, 65, 99. The act occurred when she was in the sixth grade when she would have been 11. TI 110-111. Her date of birth is June 1, 2001. She claims that the act took place in her Aunt Alicia's bedroom of her grandmother's trailer after she went next door to obtain limes for the family dinner. T1 110, 158-159 Complainant described her grandmother's house as immediately next door to her trailer. TI 89. The address of the grandmother's house is 84414 2nd Street, Hartford, MI 49057. The complainant's address is 84480 2nd Street, Hartford, MI 49057.

Complainant testified that 9 or 10 people lived in the mobile home with the defendant, who slept on the couch in the living room. TI 167. She testified that the persons living with the defendant included her paternal grandmother, Aunt Alicia*, cousin Sarsi, her grandfather, uncle Gonzalo, defendant and others. TI 91, 166. As her grandmother's household was next door, she often went there to play with defendant and other family members, including video games in her uncle Gonzalo's room along with Jasmine. TI 96-98. At the time of the alleged penetration in her aunt's room by defendant, it was dinner time, which was the occasion that she went to get the limes. TI 110-111. At her grandmother's house during this penetration incident, complainant testified that "no one" was there, just her and the defendant. TI 110-111. The prosecutor stated in his closing argument that during the sexual penetration act:

> Abigail said she went for lemons, limes, whatever; her and the defendant **are home alone**. **Nothing to dispute that evidence**. He pulls her Capris down, he puts her on the bed on her back and stands between her legs, he sticks his penis in her. TII 124 (emphasis added)

* The transcript states "Arceli."

Complainant described defendant and his family as all living very close together where they played, play fought, and occasional horseplay. TI 141-142.

In the penis to vagina penetration incident described above, complainant testified that she hurt and there was blood coming out of her private area following the incident on the bed. TI 172. She testified as follows:

> A. After that, I went into the bathroom and I saw that there was blood coming out. TI 116
>
> * * *
>
> Q. Okay. And then you said you went to the bathroom and there was blood?
> A. I went back to my house then to that bathroom.
> Q. Okay. You went back to your own house, went into your own bathroom.
> And are those -- and not that you know this, but are those on the septic system or do you have a septic tank at those places or --
> A. Yes.
> Q. Okay. And you see blood?
> A. Yes.
> Q. And did that not concern you?
> A. It did.
> Q. It did?
> A. Yes.
> Q. And what did you do then?
> A. Nothing.
> Q. Okay. You didn't take a shower?
> A. No.
> Q. You didn't change your clothes?
> A. I think I changed my underwear.
> Q. You changed your underwear. Was there blood on your underwear?
> A. No.
> Q. Was there blood on the bed?
> A. On the -- no.
> Q. **You don't know, there might have been, but you didn't see it --**
> A. **Yeah.**
> Q. -- is your testimony?
> A. Yes. TI 171-173 (emphasis added)

After the incident, she went to her house to the bathroom:

> Q. So when we spoke at the preliminary examination you said you went to the bathroom and noticed there was blood. Do you recall saying that you went to the bathroom at the grandma's house?
> A. In my house. TI 173

At her own house, where some of the touchings occurred, her mother Melissa Garcia, father Juan Victor Garcia, sister Jasmine, and others were residing at that time. TI 89-91. Her house was likewise a mobile home. TI 88. Between the two households, a total of around 9 to 10 people lived. TI 167.

Defendant claims that it was ineffective for trial counsel not to call any of the individuals who were continually residing in the cramped mobile home trailer where defendant resided to describe that no interaction occurred between defendant and complainant. It was further ineffective not to call any witnesses from the mobile home trailer where the complainant resided. See *Plaintiff's Brief in Support of Amended Motion for New Trial and Ginther Hearing.*

B. Testimony of Potential Defense Witnesses at the Motion for New Trial and Ginther Hearing

Four defense witnesses testified at the Motion for New Trial and Ginther Hearing on June 16, 2015. In addition, offers of proof from Defendant's brother Gonzalo Garcia and Defendant's mother Eleazar Garcia were admitted as Exhibits L and M. The live witnesses at the hearing were Lydia Garcia-Mandujano, Alicia Garcia, Alejandra Gonzalez-Garcia, and Jozelyn Consuegra.

Lydia Garcia-Mandujano

Lydia Garcia-Mandujano testified that in the time frame of January and February, 2013, she was living in an apartment in Decatur. She was called upon to stay at her parents' trailer, where her brother the Defendant resided while their parents were in Mexico. Lydia was 32 years old as of the time of the hearing. *June 16, 2015 Ginther Hearing* at 7. She stayed at the parents' trailer with Defendant for the whole month of January and two weeks of February, 2013. The

purpose of her staying at her mother's house was to take care of her siblings while her parents left to go to Mexico. *Id* at 8. Her parents went to Mexico on January 6, 2013. Lydia Garcia stayed at the trailer with her three children and her brothers, including Defendant, were under her care. *Id* at 8.

Lydia Garcia stayed continuously at the trailer while her parents were away. Because of space limitations, she slept in the living room. Jose stayed in the same living room on a different couch. *Id* 56-57. Also staying with her to take care of the family members in the parents' absence was her sister, an adult, Alejandra Gonzalez-Garcia. *Id* at 8. Lydia recalls some friends coming over on the Defendant's birthday, which was January 18. People at the trailer included Lydia, Alejandra, Jose the Defendant, her three children, and a younger sister. *Id* at 8-9.

Lydia Garcia stayed at the trailer every night with her siblings. *Id* at 10. She and her family members were at her mother's trailer: "the family is large. There are people there all the time. We are all there together in the living room, eating, playing." The complainant Abigail Garcia came over to her parents' trailer, including Jose's birthday on January 18. She never saw the Defendant and Abigail in a separate room "because the house was never alone. There are a lot of children." *Id* at 10. Lydia never saw Defendant and Abigail separately in any part of the trailer while she was there in January and February, 2013. She was there at the trailer continually because she did not work. *Id* at 11. She observed no inappropriate contact between Defendant and Abigail. Lydia had her daughter and her sons and just like her children, Abigail was always there with them. There was no touching of Abigail in any way by the Defendant. *Id* at 11.

Defense counsel Larry Margolis never spoke with Lydia Garcia. *Id* at 21. Nor did his law clerk Timothy Cretsinger. *Id* at 16. She was not present in the courtroom during the Defendant's jury trial. *Id* at 17.

Alicia Garcia

Alicia Garcia testified she was 22 years old and Defendant is her brother. Abigail Garcia is her niece. She testified that she lived at her parents' trailer on 2nd Street in Hartford, Michigan throughout her life. She moved out in December, 2013. *Id* at 27-28.

She testified that Defendant's Exhibits A and B were pictures of the outside of her parents' trailer where Defendant resided during the times in question. *Id* at 29-30. She described the house as a single-wide trailer. Exhibit C is a pair of pictures of the house where Abigail Garcia resided, taken from the perspective of the Defendant's house. It is adjacent to her parents' trailer. *Id* at 30-31.

Exhibit D is a picture of the hallway leading to Defendant's brother's room, Gonzalo Garcia. Next to that is the bathroom. In the foreground is the room where Alicia Garcia slept. She testified that it had no doorknob. She was not able to shut the door, which affected the privacy in that room. *Id* at 31. Exhibit E is the room where Alicia lived and slept. This is the room that complainant testified the sexual penetration occurred. TI 110. The room was in the same condition as of the January-February, 2013 time frame as depicted in the picture. She shared the room with her niece Sarai and slept in the room together. *Id* at 32.

Exhibit F is also Alicia's room opening to the hallway. Generally, it was open most of the time in the January-February, 2013 time frame and before. No one ever fixed the doorknob to the door. *Id* at 32. Exhibits G and H depict the room of Gonzalo Garcia, her brother. Exhibit I is the bathroom between the bedrooms of Gonzalo and Alicia Garcia. *Id* at 32-33. The door to Gonzalo's bedroom could be shut and was able to be locked. *Id* at 33.

Exhibit K was identified as an accurate layout of the trailer identifying the various bedrooms, living room, kitchen, and so on. *Id* at 34. Exhibit J is the living room and kitchen of the trailer with various people present.

Alejandra Gonzalez-Garcia

Alejandra Gonzalez-Garcia testified that she was 25 and the Defendant was her younger brother. *Ginther Hearing* at 52. Along with her sister Alicia, she was asked to move in and stay with her younger siblings while her parents went to Mexico in the January-February, 2013 timeframe. She had been living with her husband in her house at that time. *Id* at 54. Both moved into the trailer to help take care of the siblings. Referring to Exhibit K, she and her husband stayed in her parents' bedroom. Her husband stayed with her because of the high-risk pregnancy and he did not want her to be by herself. *Id* at 73. Her role was to watch them and make sure that Jose and Itzel (her younger brother and sister) went to school and generally watch over them. Her older sister Lydia did most of the cooking and cleaning. *Id* at 56. Thus, it was the Defendant, Alicia, Itzel, Lydia and her three children, and Alejandra and her husband staying there. *Id.*

Lydia stayed in the living room during the January-February, 2013 timeframe. The Defendant also stayed in the same living room but on a different couch. *Id* at 56-57.

Alejandra never saw Defendant and Abigail in a room together separate from other people. She saw them playing games together, but with all of the kids, never by themselves. *Id* at 57. During the January-February timeframe, she never saw Jose and Abigail in a corner of the living room separated from other people. As she testified:

> A. The living room is very open so there's no -- when you open the door, you see everything, you can see the kitchen, you can see the living room. It's just like an open space. It doesn't have like barriers or walls or nothing like that.
> Q. Did you ever see Jose and Abigail under covers in the living room?
> A. No.
> Q. Did you ever see Jose engage in any kind of inappropriate conduct with Abigail?
> A. No.
> Q. Did you observe any sexual contact between Jose and Abigail?
> A. No. *Id* at 58.

When Alejandra left the trailer, she only went to church and maybe out to eat. The Defendant came with her to go to church. *Id* at 58. They went out to eat occasionally. *Id* at 58-59. She never observed Jose left alone in the trailer: "No. There is always people there all the time." *Id* at 59.

Whenever Alejandra returned from activity that she was doing outside the trailer in the subject timeframe, she never observed Jose alone in the trailer when she got back. She never observed Defendant and Abigail in the trailer by themselves. Further, when she left the trailer for any reason, she never observed that Defendant and Abigail were ever left alone in the trailer. As she emphasized, Alejandra did not have permission from her doctor to move too much. *Id* at 58. She would only go to church and then to dinner and then come back. Whenever she went on rides, Defendant as well as her sisters Itzel and Alicia were with her and her husband. *Id.* at 59-60. While she was in the trailer, she never observed Defendant and Abigail in the trailer off by themselves. *Id* at 60.

Alejandra testified that during the time she was "babysitting" in the above timeframe, Defendant worked nights with his cousin Juan and came back around midnight. *Id* at 60.

Defendant had a girlfriend sometime around his birthday on January 18. In January, 2013, Defendant started going steady with his girlfriend. He and his friend Scott went out to eat with their girlfriends, who were sisters. *Id* at 60-61.

Alejandra testified that Abigail, along with her family, went to Texas in January, 2013 for close to a month. From December, 2012 to January, 2013 they were gone. *Id* at 61. She testified that at the same time that her parents were in Mexico, Abigail and her parents were in Texas. *Id* at 61-62. Alejandra along with others were present for Defendant's birthday party on January 18. Abigail was present and having a good time. Based upon her observations she could say that Abigail did not express fear of anybody. Every time that Abigail came over following the

birthday party, she was "always happy." *Id* at 63. Exhibit S is an aerial photographs admitted into evidence showing the trailers where Defendant and his family lived and the trailer where Abigail lived. *Id* at 64-65. The two trailers were right next door to each other with a sidewalk that connects both trailers porch to porch. *Id* at 63. Alejandra and trial counsel Larry Margolis never talked about the trailer nor how many people were there in January and February, 2013. To her knowledge, Mr. Margolis never visited the trailer or asked questions about the number of people living there. *Id* at 64, 75.

Alejandra described the living conditions where the living room was Defendant's bedroom:

> THE COURT: Okay. So there would be times when a lot of people may be watching TV with you and other people as well?
>
> THE WITNESS: Yeah. Actually, his closet is our cabinet where we have to store food. That was his closet because he didn't have a room. He was in the living room. And my sister Alicia, she would get mad if he would go into her room. So my mom put his clothes in there. It's like a food pantry, they call it, where his clothes was. *Id* at 78

The purpose of her parents having her watch over the siblings in January-February 2013 was so that they would not think they were by themselves and could do whatever they wanted to do. *Id* at 72.

Alejandra complained that the family had an issue with Margolis because he would never tell them what was going on. "He was always keeping it to himself because he didn't want us to know much because he was, I don't know what he was thinking, like he was hurt, he didn't know what to do, but most of the times he was always – he would go visit with him [defendant] himself. I think there was one occasion where my other brother went with him." *Id* at 70. Margolis kept his communications confined to Jose. *Id* at 70-71.

Even though Alejandra, the Defendant, Alejandra's sister, and her mother Eleazar were present at the preliminary examination, trial counsel never talked with them about the trailer or

the number of people present during the various periods of time. He talked about nothing with them at the examination. *Id* at 75.

Jozelyn Consuegra

Jozelyn Consuegra testified that she is the girlfriend of the Defendant. They have a daughter together. The first time that she met Defendant was in church in December, 2012. *Id* at 79-80. They started a relationship on January 19, 2013, the day after his birthday. She recalls that at that point, they went to the mall and movies. They would go out or spend time at her house watching movies at night and sometimes she would stay over when it was real late. She lived in Benton Harbor, Michigan, about 45 minutes away. *Id* at 82. She came similarly to the trailer where he lived for parties and events. *Id* at 81.

During the timeframe in January, 2013, they went to the mall, stores, or would be at her house in Benton Harbor. Sometimes she would stay over on weekends so he could go to school and work. She testified that they would always talk at night on the phone every night. *Id* at 83. She saw Abigail at Jose's trailer three times or so. She observed no inappropriate conduct between Jose or Abigail. *Id* at 83-84.

Gonzalo Garcia

Defendant's Exhibit L is an Offer of Proof of Gonzalo Garcia admitted by the Court. *Ginther Hearing* at 25. He is the father of the Defendant and lives at 84414 2nd Street, Hartford, Michigan in a single-wide mobile home trailer from 2000 to the present time. The trailer is approximately 14 x 80 feet. His wife is Eleazor Garcia. They are the parents of the following children: Alejandra Gonzalez, Lydia Garcia, Gonzalo Garcia, Jose Garcia, Itzel Garcia, and Alicia Garcia.

During the January and February, 2013 time frame, all of Gonzalo's children were living at their parents' residence at the above address. During the first week of January, 2013, Gonzalo,

his wife Eleazor, and their granddaughter Sarai went to Mexico. They returned around February 1, 2013. At around the same time that they left for Mexico, their other son Juan Garcia left for Texas with his daughters Abigail and Jasmine and his wife Melissa. Gonzalo only saw Abigail occasionally and never saw her alone with his son, the Defendant. Because of the large number of family members living in the house, Defendant was never alone in the house and Gonzalo never saw any inappropriate behavior or sexual misconduct between his son and Abigail.

Eleazor Garcia

Eleazor Garcia is the mother of the Defendant. During the winter of 2012-2013, Eleazor was not working and received unemployment. Defendant's Exhibit M. On January 6, 2013, Eleazor, her husband Gonzalo, and their daughter Sarai left for Mexico to visit family. According to Eleazor, her husband was sick at home with high blood pressure and on medication. He was at home all the time in February and March, 2013. For her part, Eleazor cooked all meals at home for her family. Alicia, Itzel, and Defendant went to school from 7:00 a.m. to 3:00 p.m. at Hartford High School.

C. Trial Counsel Opened the Door to Damaging Testimony On the Use of an Adult Speculum on the Complainant and Failed to Object to the Hearsay Testimony of the Physician's Assistant Identifying Defendant

At the pretrial hearing on September 5, 2014, defense counsel made its first request for medical records from the Stagg Medical Center, where the complainant had seen her physician's assistant, Gene Lafever, on December 10, 2013. Trial counsel filed a motion for in-camera-review of records, including the medical records, at the pretrial. The court noted that "the motion is beyond the Court's scheduling deadline and that this matter has been scheduled for trial previously and adjourned for discovery reasons, but I will not address it simply in its barren state at this time." *September 5, 2014 Pretrial Hearing* at 6. The motion deadline was months before the prehearing. The motion had no notice. *Id*. at 8. The trial was scheduled for 12 days

later. *Id.* at 11. The request for medical records pertained to whether there were inconsistent statements made by the complainant based upon her history of making different allegations about what happened in terms of sexual abuse. *Id.* at 11-12, 14-16. After discussion on the record, the prosecutor agreed to obtain the medical records to the extent he could, stating:

> MR. BEDFORD: Your Honor, now, with this much focus, I will get that record. If it's statements made for medical purposes, *I mean potentially it could be harmful to him* and I could see the value in it for getting to the truth, but it could go both ways. Pretrial Hearing at 17. (emphasis added)

The complainant waived any privilege applicable. *Id.* at 17-18; TI 215. Thus, defense counsel was able to talk to the physician's assistant, Gene Lafever, before trial. However, he did not. *Ginther Hearing* at 174-175.

Lafever testified that she examined complainant on December 10, 2013. TI 215-226. The examination occurred after the allegations of sexual abuse were reported on December 5, 2013 to the police. See Defendant's Exhibit P at pages 3-4 for police report. Complainant had disclosed very shortly before the police investigation that she had told her friend Natalie, who in turn told school counselor Gail Getman, who then referred the matter to the Department of Human Services. *Id* at 1-2. Following that report, the Michigan State Police Post was notified. *Id.*

The December 10 appointment between complainant and Lafever took place eleven months following the act of sexual penetration alleged by the complainant and five days after the opening of a criminal investigation. Defendant's Exhibits P and Q.

Lafever testified that she is a physician's assistant licensed in the State of Michigan since 1991. T1 214. As part of the office visit with complainant, Lafever testified that she collected medical history from the patient. She agreed that the physician-patient privilege had been waived and she was under subpoena. TI 215. Lafever further testified that the complainant and her mother Melissa Garcia came in for her to be checked out "because she had recently revealed

that she was sexually molested and raped and she and her mother wanted me to examine her and to make certain that she was physically okay and that she had no sexually-transmitted diseases." TI 216. Regarding the patient history from complainant, she testified:

> Q. And prior to doing the physical examination, did you get -- attempt to get any history from Abigail regarding the circumstances so that you could perform this examination?
>
> A. What Abigail told me is that **she had been molested by her uncle** who lived next door from about the time she was five or six, he had started out by touching her and advanced to using his finger, but most recently he had pulled her clothes off and raped her. TI 216

On cross-examination, defense counsel elicited the damaging testimony identifying defendant again that complainant had relayed to Lafever, namely, the abuse and "he had raped her," including "penile…vaginal intercourse…." TI 218. †

Relying only upon the medical records generated by Lafever and without interviewing her before the trial about those medical records, defense counsel posed the following question:

> Q. Okay. And other than Abigail's claims, there was no medical evidence that you discovered. Correct?
>
> A. It was very easy to examine her. *I used an adult woman's speculum on her and it entered very easily. She had no problem receiving that. That was highly unusual for a 12-year-old*. TI 220. (emphasis added).

No evidence about Lafever using an "adult speculum" ever came out on the prosecutor's direct examination. Nor was it in the medical records. Defendant's Exhibit R. Moreover, defense counsel returned to the unexpected testimony about the speculum as follows, producing this answer:

> A. It is not typical for a child that age to be able to tolerate even a small pediatric speculum, let alone an adult speculum. TI 221

† It was the position of the complainant as well as the prosecution that the sexual intercourse had occurred in January, 2013. TI 110-111;146-147;186;TII 61, 65, 99.

When asked if she was trained in forensic interviewing for medical purposes or doing a clinical assessment, Lafever replied "No. *She was involved with the legal system* by then. I only asked her the information I deemed necessary to treat her that day." TI 224 (emphasis added).

The surprise testimony from Lafever under cross-examination by defense counsel is best described by the prosecutor in his closing argument:

> ***They say, "A lawyer should never ask a question if he doesn't know the answer to it."*** What she said about the adult-sized speculum and the ease with which it was inserted into Abigail's vagina was not in the report.
>
> I called her as a witness to testify about statements made for medical purposes because that's what the law tells me I can do. It's not hearsay. There's an exception. So it's permissible because kids, when they tell doctors, when they're at the office, when they're worried about their condition, the law says they can do that.
>
> ***Now, the defense attorney makes a huge mistake.*** **He could have interviewed the physician's assistant. We had a report all along. He knew who she was. He could have called her up and said, "Hey, I'm going to ask you on the stand, 'Was there anything in your physical examination or your findings that would be indicative of this type of assault?'" But he didn't, and he helped you get more truth. And now he's going to call her a liar? Don't think so. TII 123-124 (emphasis added).**

The prosecutor went on to showcase the physician's assistant as an important corroboration of the testimony of complainant:

> When you compare what she said about the ease of the insertion of the adult-sized speculum into Abigail's vagina and how *abnormal* that was and how she paused when he had asked that question, and then he went back to it, she paused again. "*Abnormal*" is the word that I remember her saying. I leave that to you.
>
> What does that tell you? Well, it tells you that it's consistent with other things having been put in her vagina before. Could be tampons; could be fingers, *the defendant's fingers; could be a penis, the defendant's penis*. TII 124 (emphasis added).

The prosecutor then went back to the physician assistant for a third time to establish important corroboration of her testimony with complainant's testimony that "he stuck his fingers in there

and it hurt, she didn't like it. *Sooner or later you keep sticking things in there long enough,* it is very consistent with what Dr. Lafever told us." TII 125 (emphasis added). This again referred to the adult speculum that was so easy to insert into the complainant. The adult speculum was the only **physical** evidence establishing the sexual abuse by penetration. *Ginther Hearing* at 124-125.

D. Testimony of Larry Margolis at the Ginther Hearing

1. Failure to Call Defense Witnesses Concerning the Presence of Numerous People at Defendant's Trailer During the Time of Alleged Acts of Sexual Penetration

Attorney Margolis testified he has been practicing law for 19 years, most recently in the State of Michigan since late 2007. *Ginther Hearing* at 86. The attorney recalled that he was introduced to the Defendant in early 2014. The family of the Defendant called him, receiving his name from a friend or family member that he worked for in an immigration-related matter. *Id* at 88. His practice is located in Ann Arbor, Michigan. Alejandra Garcia was a principal point of contact in meeting with the Defendant. *Id* at 89.

Margolis testified he interviewed the sister and the mother in the sister's presence because Defendant's mother did not speak much English. Margolis spoke very little Spanish. They held the preliminary examination where he "interviewed the complainant," meaning cross-examination. *Id* at 91. The sister was Alejandra Garcia and the mother was Eleazar Garcia. *Id* at 92.

Besides Alejandra and Eleazar, there were no interviews of other family members. Margolis did not visit the trailer where the allegation of sexual penetration was alleged to occur. He did not get any pictures of the exterior or interior of the trailer. *Id* at 92. With respect to a description of the trailer and the living conditions he testified:

> A. It's possible in those initial meetings in my office that it was written out. I know that we discussed the proximity of the trailers

> to one another, the size of the trailers, the difficulty of this occurring with them being so close and the crowded nature of the family living situation, but I can't specifically recall getting a diagram. I know I didn't pay to have one done, yeah.
>
> Q. Was it your understanding that the living conditions in the trailer where some of the acts or the act of penetration is alleged to have taken place was a crowded trailer?
>
> A. Yes, I knew, yes because Jose had to sleep on the couch. *Id* at 93.

Margolis testified that he understood that there were a number of family members living in the trailer when the acts were alleged to have taken place. Defendant never had his own room and was always on the couch in the living room because numerous other people including family members were living there. *Id* at 93.

With respect to the January-February, 2013 dates, Margolis testified that he was always going to focus on who was living in the trailer to establish that in a cramped and crowded set of living conditions it was unlikely that an act of sexual penetration would have occurred without being observed, “but I don’t believe I thoroughly focused on that.” *Id* at 94-95.

Margolis agreed with the proposition that in terms of trial strategy it would have been a good idea to call witnesses to testify as to the cramped or crowded living conditions during the time frame when the penile penetration was alleged to have taken place. *Id* at 95. Margolis recalled cross-examining Trooper Fitzgerald concerning investigating people who were living at the trailer during the January-February, 2013 timeframe:

> Q. And what was the purpose of that cross-examination?
>
> A. Show an inadequate investigation of the residents, to try to hammer the People, the state on their, "Oh, I see he's not doing his due diligence."
>
> Q. Would you also agree that some of that due diligence could be attributed to you, quite frankly?
>
> A. Yes. *Id* at 95-96.

In Defendant's Exhibit O (admitted at the *Ginther Hearing*, *Id* at 108), Margolis filed a list of witnesses and proposed exhibits with the court on September 2, 2014. The trial started on September 17, 2014. *Id* at 96. On the list of witnesses in Exhibit O, there were no family members in Defendant's trailer listed. *Id* at 97.

In terms of trial strategy, the credibility of the complaining witness, Abigail Garcia, was the main issue in the case from his perspective as trial counsel. In that regard, he brought out different versions in his closing statement pertaining to various versions of what happened by the complaining witness. *Id* at 97. He agreed that during the course of a trial, a number of things can affect or impinge upon a witness's credibility. *Id* at 97-98.

Margolis testified that he was familiar with the proposed testimony of various witnesses at the *Ginther* Hearing through offers of proof, live testimony, and other documents supplied to him before the *Ginther* Hearing. With that information in mind, Margolis testified that the testimony of the proposed defense witnesses was something that he should have brought up to help in the credibility contest between the complainant and the Defendant at the trial. *Id* at 99. He also agreed that in this case he would need as much help in a credibility contest as he could get to aid his client. *Id* at 99.

Margolis conceded that the prosecutor exploited the fact that there was no evidence as to anyone being in the house during the sex acts and that Defendant and Abigail were allegedly alone during the time period in question. *Ginther Hearing* at 100. See TII 96, 124 at page 3 *supra*. On cross examination, the prosecutor elicited from Margolis that the complainant always testified she was alone with Defendant with respect to the sexual penetration. *Id* at 137.

In response to the prosecutor's suggestion as to what defense counsel's strategy was or should have been, Margolis replied:

> Q. Okay. So the strategy is keep it simple, a winning strategy, do the best you can and, if it doesn't work, that doesn't mean we get a second shot. Right?
>
> A. Well, I can't speak to what the Judge may or may not do or the Court of Appeals. Maybe I'm confused about the question. I know that I would try this thing -- **I know that I didn't have warm bodies and I know you have to have warm bodies sometimes. I didn't do that. Was it -- I'd like to say it was a strategy call not to have warm bodies, but I can't even say that, I can't even say that.**
>
> Q. So what -- you've got to be straight on this. What are you saying then?
>
> A. What I'm saying is that I didn't call the family because they get scared about coming to court. These aren't folks like "you and I," so to speak, and I shouldn't have worried about that. **I should have gone to the house. I should have done other things differently.**
> *Id* at 152-153. (emphasis added)

With respect to the credibility contest theory that Margolis tried to develop, he added a variant of that theory, namely, that complainant was motivated to lie because she was in love with the Defendant and when Defendant told her that he had a fiancé, she took it very hard and tried to punish him. As he put it, complainant "had a motivation to lie because he was leaving her." He admitted it was not a good theory because it just made them appear closer. *Id* at 156.

Margolis agreed that the testimony of the defense witnesses at the Ginther hearing would have improved the theory of the credibility contest. *Id* at 155-156 He further testified:

> Q. Let me ask: Do you believe these -- well, let me ask the witness. Do you believe that these defense witnesses would have helped you at the trial looking at it from the perspective of the trial, not 20/20 hindsight?
>
> A. Well, again, retrospect hindsight is 20/20.
>
> Q. Correct.
>
> A. And so yes, they would have helped me, and what I alluded to with Mr. Bedford was that -- and I seem to recall talking to my client about this, who can help us, who do we need to call, who can we call, and so I'm bringing in my immigration practice into this case to some degree because these folks don't like going to court. You were here during the trial.

> Nobody came. And there's a reason they don't come is because they get afraid and I understand that. **So I probably in retrospect, again, should have not cared about that and said, "No, you're going to be fine, get your tuckus here, get your butt here."** *Id* at 157.

He agreed he could have, but did not, subpoena any family members living in the trailer. He knew where they lived. *Id* at 157-158.

2. Failure of Defense Counsel to Interview the Physician's Assistant Pertaining to Her Proposed Testimony or Object to the Hearsay Identification of the Defendant

At the *Ginther* hearing, Margolis recalled the pretrial hearing involving the court, prosecutor, and himself on September 5, 2014. The purpose of that pretrial was to deal with any issues that had been unresolved, including obtaining medical records that he believed were relevant to the case. *Id* at 101. Margolis had subpoenaed health records of the complainant. The prosecutor committed to help obtain those records in advance of the trial, which was scheduled for September 17, 2014. Thus, there were only about 12 days to prepare for that issue. *Id* at 102.

On June 13, 2014, Michael Bedford, the prosecutor in this case, received an email from Michigan State Trooper Alan Fitzpatrick, notifying him that the Child Assessment Center forensic interview of complainant had been erased and could not be retrieved. Mr. Bedford forwarded this email to Attorney Margolis simply stating: "Larry, Unbelievable – see below. The CAC DVD is no more, apparently. Sorry."

Exhibit P was a police report from Trooper Fitzpatrick. By March, 2014, he testified that he should have received the police report. *Id* at 104. For certain, he had the police report before the preliminary examination. *Id* at 105. At pages 3 and 4 of 8 in Exhibit P, there was a reference about the doctor's examination involving the complainant on December 10, 2013.

On Page 7 of 8 of Exhibit P there was a reference to Abigail's medical examination at the Hartford Medical Center. *Id* at 105. Those were the medical records referred to in the pretrial hearing on September 5. *Id* at 105. Exhibit Q is the supplemental report of Trooper Fitzpatrick

that trial counsel received. *Id* at 105. This, too, he received before the preliminary examination. There was a reference on Page 4 of 6 of Exhibit Q to a medical examination of the complainant made by Trooper Fitzpatrick of his interview of the Defendant. *Ginther Hearing* at 106.

Exhibit R was the medical records from Stagg Medical Center that trial counsel had subpoenaed. They are the progress notes of Gene (Jean) Lafever, the complainant's physician assistant treating her. This is the individual who testified at trial about the medical condition and examination of the complainant. *Id* at 108. According to the fax notation, trial counsel received them on September 10, 2014, a week before trial. *Id* at 108-109.

Defense counsel reviewed the medical records after receiving them. He noted that there was no mention in those records of any kind of a speculum, adult or otherwise. *Id* at 112. Margolis admitted that he did not interview the physician's assistant, who drafted Exhibit R. *Id* at 112-113. However, he could not say categorically that the records were going to indicate no physical injury. *Id* at 114.

Trial counsel agreed that the privilege of the complainant had been waived because "we got the records." *Id* at 115. The physician's assistant testified after it was represented there was a waiver:

> Q. And what was the nature of your involvement in this particular case generally speaking? I'm going to make sure we don't get into a privilege. I mean this is – the privilege is not an issue. It's been dealt with, but I don't know that you're comfortable in knowing that, so let me just tell you that the privilege has been waived by the victim in the -- obviously, you're under subpoena and the Court would otherwise warn you, so --
>
> A. Thank you. TI 215.

At trial, the prosecution had produced Lafever to testify. During the direct examination nothing came out about an adult speculum. However on cross-examination, the physician's assistant testified that she had used an adult speculum on the complainant. Margolis testified at

the *Ginther* Hearing that this was a surprise to him because it was not in the report or records that he received. Thus, not only the fact of the adult speculum but her "manner of stating it" was a surprise to him. *Id* at 116. Margolis did not anticipate that she was going to talk about the adult speculum: "I anticipated only that she would speak to what was in her report, and that was not that I could see." *Id* at 117. Margolis testified that if he had talked to the physician's assist he would have asked questions along the lines of what was in the report. He would have inquired if there were any other kind of examination that might not have been in the report. Margolis conceded that he did not do that. *Id* at 115.

Margolis testified that he recalled the physician assistant testifying:

> "It was very easy to examine her. I used an adult speculum, adult woman's speculum, and it entered very easily. She had no problem receiving that. That was highly unusual for a 12-year-old."
> Do you recall that testimony?
> A. I remember, yes. *Ginther Hearing* at 117 quoting Trial Transcript at TI 220.

Margolis testified if he had found out from an interview of the physician's assistant that she would raise the issue of an adult speculum, he would have been better prepared with an expert with something to rebut it. However, he would have been better prepared only if he had known what she was going to testify to. Other matters that he wanted to get out from the physician's assistant he could have obtained (such as the assertion of the June, 2013 date for sexual acts versus January, 2013), he could have obtained on cross-examination without getting into other areas where the speculum came up. *Ginther Hearing* at 118. If Margolis had known about the speculum from an interview, he would have targeted his cross-examination to specific areas of physical examination if he had asked any questions at all. *Id* at 119. Margolis further agreed that there was no mention of the adult speculum on direct examination. *Id* at 119-120.

During closing argument, the prosecutor discussed in his rebuttal closing argument the issue of not interviewing a witness on pages 123-124 of the trial transcript. *Ginther Hearing* at

120 referring to trial transcript at TII 123-124. The following questioning of trial counsel ensued at the *Ginther* Hearing:

> Q. Line 8, where it says, "They say a lawyer should never ask a question if he doesn't know the answer to it." Do you recall that –
>
> A. Yes.
>
> Q. -- in rebuttal closing argument?
>
> A. I recall Mr. Bedford very effectively dealing with that faux pas, for lack of a better way of saying it.
>
> Q. And you recall Mr. Bedford calling your, let's say, failure to interview the physician's assistant a huge mistake?
>
> A. Yes.
>
> ***
>
> Q. Page 123, Line 19 and 20: "**Now, the defense attorney makes a huge mistake. He could have interviewed the physician's assistant. He had a report all along. He knew who she was. He could have called her up and said, 'Hey, I'm going to ask you on the stand, was there anything in your physical examination or your findings that would be indicative of this type of assault**,' but he didn't and he helped you get more truth." Do you recall that? (emphasis added)
>
> A. Very well.
>
> Q. Do you agree with that?
>
> A. Do I agree –
>
> Q. Do you agree?
>
> A. -- that I could have had more information if I spoke to her? Yes.
>
> **Q. Do you agree that it was a huge mistake?**
>
> **A. Yes.** *Ginther Hearing* at 121-123 (emphasis added)

Defense counsel also agreed that the prosecutor exploited the "faux pas" as follows:

> BY MR. BURHANS:

> Q. Then if you could read Page 124, Lines 14 to 18.
>
> A. "What does that tell you? Well, it tells you that it's consistent with other things having been put in her vagina before, could be tampons, could be fingers, the defendant's fingers, could be a penis, the defendant's penis."
>
> Q. Thank you. Is it fair to say that the prosecutor made a lot of hay of the adult speculum?
>
> A. Yes.
>
> Q. Now, getting back to this credibility contest between Jose Garcia and Abigail Garcia and their respective testimonies. Up until that point, was there any physical evidence introduced into the record by the prosecution?
>
> A. No.
>
> ***

Margolis testified that it would have been a good idea to cross-examine the physician's assistant absence of the speculum in the report. *Ginther Hearing* at 125-126. Margolis testified that he thought he made mention of it on re-cross examination. *Id* at 126. The record establishes that no mention was made of it during the trial by him. TI 218-222; TI 224-225.

Margolis agreed that with respect to his closing argument, the credibility contest between Defendant and the complainant was impaired because of the presence of the surprise testimony from the physician's assistant concerning the speculum. *Id* at 132.

Margolis said that "If you have witnesses that you didn't bring, you don't know what they're going to say….". He agreed that he would know what they would have to say if he had interviewed them beforehand, obviously. *Id* at 154. That would apply to the witnesses that were called for the *Ginther* hearing. It also applied to the physician's assistant. Margolis agreed that if he had interviewed her, he could have found out what she would have said in her testimony. *Id* at 154.

3. The Trial Court's Examination of Margolis

After examination by the attorneys of Margolis, the court engaged in an extensive examination of trial counsel Margolis. *Id* at 161-175

In response to the court's inquiries to what mistakes he made, Margolis testified that in the dynamic of the particular case, "it would have been better if I would have called the family members maybe on what he is alluding to about access and could it have happened, but more particularly on the change of the girl, that they noticed nothing wrong about her…." *Id* at 163-164. Although he learned it late, Margolis testified that if one is a victim of abuse, juries want to hear how she was different and did she act "weird" around each other, which was a major difference in this type of case. *Id* at 164.

The Court asked Attorney Margolis about the benefit of calling witnesses or not calling witnesses. The gist of the questions and testimony was that calling a witness can be risky. *Id* at 166-167. However, defense counsel conceded that there was no risk at all in interviewing witnesses to determine whether or not there would be a risk in presenting them before the jury. *Id* at 175-176. There could only be benefit. *Id* at 176. Margolis admitted there would have been no risk to the Defendant's case in terms of interviewing all of the family members who lived in the trailer or in interviewing the physician's assistant before trial. *Id* at 176.

Margolis agreed that it would be speculation that the physician's assistant did not like him or would not talk to him, because he didn't try. *Id* at 176. Further, he considered the physician's assistant an important witness because he filed a motion for a review of her medical records of the complainant. *September 5, 2014 Pretrial Motion* at 11. He attributed his actions with respect to this witness as "a little bit of a lack of experience trying this type of CSC." *Id* at 176-177. Further, a mistake in a first degree criminal conduct has a different consequence because it was, in his words, a life offense. *Id* at 176-177.

II. ARGUMENT

A. The Constitutional Standard For Ineffective Assistance of Counsel

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const. 1963, Art 1, § 20. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 U.S. 685, 695; 122 S. Ct. 1843 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Failure to call a witness is ineffective assistance when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 822; 608 NW2d 132 (1999).

Defense counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The choice of strategy made after an incomplete investigation is reasonable "only to the extent that reasonable professional judgments support the limitation on investigation." *Wiggins v Smith*, 539 U.S. 510, 521-522, 528; 123 S. Ct. 2527 (2003). According to *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004), "the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome."

B. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO CALL DEFENSE WITNESSES WHOSE TESTIMONY COULD HAVE CREATED A REASONABLE DOUBT THAT SEX ACTS BETWEEN THE DEFENDANT AND COMPLAINANT OCCURRED IN A CROWDED SINGLE-WIDE TRAILER

Standard of Review: Whether a person has been denied the effective assistance of counsel is a missed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. *People v. Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003) Appellate courts review a trial court's findings of fact for clear error. *People v. LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo. *Tolksdorf v. Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001)

The Court of Appeals and trial court held that the failure of trial counsel to interview any witnesses who were in the trailer at the time of the alleged crime was a calculated strategy on his part. Rather, it indicates the opposite. A strategy implies that trial counsel knew what the defense witnesses would say and, considering that information, made a conscious decision not to call them for legitimate reasons and chose a different strategy. Instead, trial counsel not only failed to interview the numerous witnesses in the trailer at the time of the crime, but admitted that it was a mistake and he should have done so. As a result of not interviewing the defense witnesses, trial counsel was unaware of two key facts that they could credibly offer to the jury: (1) testimony that would directly contradict the complainant's testimony that she was alone in the trailer during the forcible sexual penetration on the bed of Defendant's sister, Alicia Garcia. In fact, the testimony established clearly that at least eight or nine people were living in the small (14 x 80 ft) trailer where family members were so crowded that they were sleeping in the living room on couches, doubling up in bedrooms, and using kitchen cupboard space as a closet; (2) Alicia Garcia, in whose bedroom and on whose bed the sexual assault allegedly occurred, would have contradicted the victim's testimony that she was bleeding after the sexual penetration occurred and some of it might have been left on the bed itself. Alicia testified that there was no blood on her linens at any time and she was the one who washed them.

Instead of analyzing the record, the Court of Appeals merely repeated the conclusions reached by the trial court. The record establishes the admissions by the trial counsel of his mistakes and shortcomings pertaining to the failure to interview the defense witnesses to make a reasonable professional judgment that it was unnecessary to do so. The record further contradicts the defendant's failure to call witnesses as trial counsel conceded that the comings and goings of a large number of people in the trailer during the time frame that the criminal act occurred was significant and *blamed* the prosecution for not producing the witnesses. During closing argument, this was an admission that the defense witnesses were significant enough to be called by the trial counsel himself.

Both the trial court and the Court of Appeals discussed the "risk inherent in calling additional defense witnesses" without acknowledging the fact that trial counsel had no idea what those witnesses could attest to before a jury as he did not interview them. In addition, he did not visit the trailer were the crime was alleged to have occurred, even though it was under the control of friends and family of his client. The record does not support the trial court's conclusion, adopted by the Court of Appeals, that crowded living conditions depicted an environment "conducive to undetected sexual assault." Exactly the opposite conclusion is warranted. There is nothing in the record to support any "chaotic" living conditions. The presence of large numbers of people supports the conclusion of defendant that a forcible sexual penetration could not occur without being noticed.

Significantly, neither the trial court nor the Court of Appeals addressed the issue of the testimony of the complainant that she might have bled on the bed of the sister of Defendant and the failure to call her as a witness. It is undisputed that trial counsel did not interview this particular witness either.

The significance of the potential defense witnesses who lived in the mobile homes is evident. The theory of the prosecution case was that an act of sexual intercourse occurred in the defendant's trailer. The defense should have produced witnesses to rebut the allegations that such sex abuse did, or even could, occur unobserved, especially in close quarters where all of the family members were residing and in many cases, staying in the trailer all of the time. The large extended family unit had been living in defendant's mobile home trailer for a number of years.

Given the testimony of the complainant and the argument of the prosecutor that there were virtual nonstop abuses of the complainant by the defendant, the failure to call any of the family members as defense witnesses to explain the difficulty of committing all these acts of molestation in front of a crowd of people would have significantly helped the defense in its winning the credibility contest.

A material witness was Aunt Alicia of the defendant, who testified at the hearing that there was no blood on the linens or bedding where the act of penile penetration allegedly occurred. *Ginther Hearing* at 44. In addition, the nature of the act would cause any juror to question why no one heard the acts or was talked to by the complainant. Conversely, the absence of any of the family members to come forth and give any testimony regarding the setting of where the sex acts took place would cause any reasonable juror to question why there was a complete absence of such testimony or description from the numerous potential witnesses, who are all part of defendant's immediate family.

The significance of the omission of any such defense witnesses is also contained in the questioning of the police officer. Defense counsel questioned Trooper Fitzpatrick why he did not interview any of the witnesses or why the prosecution did not call the mother and father of the complainant. Defense counsel made this argument in his closing as well - instead of calling these persons as witnesses himself. TII 115. In that vein, defense counsel cross-examined the

Trooper as to the fact that he never went into the defendant's house and never observed the scene.

Further elicited on cross-examination was that the Trooper spoke with no one in the household, whether it was Jasmine, a female minor child in the defendant's house, the father, the grandmother, or anyone else. TII 43-44. The Trooper was not sure of the "family constellation" but knew that there "were a lot of people there at times." Thus, while defense counsel was criticizing the incomplete investigation of the Trooper, it was obvious that the defense's own inadequate investigation and failure to produce witnesses was the significant failure in the case.

In a series of questions, the trial court attempted to steer the witness into admitting that his failure to present any of the witnesses and family or interview the Physician's Assistant was just a matter of trial strategy. For example, the court stated in its question that the complaining witness testified that nobody saw anything, when in fact the main point was that the complainant testified that "no one" was at the trailer where the act of sexual penetration took place. This was sharply inconsistent with what the proffered testimony established, namely, that the small single-wide trailer was filled virtually all of the time with numerous people. From the number of people and the logistics of the crowded living conditions during the narrow time frame during which the act of penetration allegedly occurred, it would have been difficult not to be aware of an act of forcible sexual penetration by the Defendant against the Complainant. *Id* at 167. Margolis did not assess the trial strategy of calling or not calling the additional defense witnesses at the *Ginther* Hearing because he never interviewed them and thus could make no assessment as to what risk there would be in calling them. *Ginther Hearing* at 92-97, 99-100, 112-113.

The court also suggested that part of the risk in calling witnesses from living in the trailer was that there was actually "a lot of chaos in this home, people were coming and going, people weren't around, there were parties going on that couldn't help you, but it could hurt you,

couldn't it?" *Id* at 169. However, there was no evidence either at the trial or from any witness at the *Ginther* Hearing that such chaotic activity occurred. To the contrary, the entire point of having the adult siblings stay at the house in the absence of the parents was to prevent any such activity. Nothing in the record supported the speculation offered by the court.

The court attempted to suggest to trial counsel that the complainant was making up a story because of her attraction to the defendant which was being interrupted by his engagement to his fiancé. The court stated that it was a struggle to confront a witness by calling her a liar. The defense counsel agreed but suggested that his approach "wasn't very persuasive." *Id* at 171. Although the court further suggested and tried to persuade defense counsel that his strategy was "'I am going to keep them off the stand myself because who knows what they'll say,"' defense counsel never agreed with that. He merely testified "I thought I fought for him vehemently" *Id* at 172.

The Court recited the presumption that whether to call or question witnesses are presumed to be matters of trial strategy and that the failure to call witnesses is ineffective only if it deprives Defendant of a substantial defense, which is one that might have made a difference in the outcome of the trial. *Id* at 8.

The trial court ignored the testimony of the complainant, as well as the argument of the prosecutor, that she was in the home alone when the act of sexual penetration occurred. TI 110-112, 124. That testimony and argument were directly contradicted by the unopposed testimony that numerous individuals occupied the trailer at a virtual non-stop basis during the narrow time frame in later January/February when the act of sexual penetration was alleged to have occurred.

Further, the trial court's ruling that the witnesses generally corroborated the testimony of the complainant was contradicted by the record. For example, the court stated "Abigail testified that no one saw the sexual exchanges between her and the Defendant, and the witnesses testified

that they didn't see any sexual exchanges." *July 9 Decision* at 9-10. What the complainant testified to was that **no one else was at home at the time the attack occurred**. TI 110-111.

The Court attempted to graft onto trial counsel's "court strategy" an after-the-fact rationale for not interviewing or producing any witnesses to testify at the hearing. Had trial counsel interviewed the family witnesses residing at Defendant's trailer and made a strategic decision not to call them for the reasons stated by the trial court, that would be one thing. However, the trial counsel's decision not to call any witnesses was not a conscious decision or a calculated strategy. It was neglect.

The trial court stated that there was corroboration about what the complainant testified to as far as blood on the sheets after the sexual penetration and the other witnesses. *Id* at 8,10. This is a misreading of the trial testimony, in which the complainant testified that she was bleeding after the act of sexual penetration and some may have ended up on the sheets. TI 171-173. Aunt Alicia Garcia, in whose room the sexual penetration occurred, testified that she did her own laundry and found no evidence of any blood stains on her sheets. *Ginther Hearing* at 44.

The court's conclusion that the testimony of the witnesses would have painted a picture "in this Court's mind anyway, of chaos in these two households" is nowhere found in the record. *Id* at 10-11. Indeed, the court's description directly contradicts the testimony of the witnesses, who testified that there was in fact adult supervision in the form of a 32 year-old, Lydia, and a 25 year-old, Alejandra. The "parties" was a birthday party for the Defendant on January 18. Although the Court found that there were people sleeping in the living room and several people sharing bedrooms, its conclusion that this portrayed a scene "ripe for an undetected sexual assault" justified precisely the opposite conclusion. What the Court mistook for "chaos" were very crowded living conditions in a single-wide trailer where a likelihood that a sexual assault occurred in a bedroom occupied by two of the siblings unobserved was very low.

In *People v. Grant*, 470 Mich 477; 684 NW2d 686 (2004), the Court reversed the conviction of a defendant whose trial counsel failed to interview witnesses on a key piece of evidence. Defendant was charged with criminal sexual conduct involving two sisters. The older sister testified that defendant had severely injured her during an act of sexual abuse. Defendant denied the charge and stated that the injury was caused by a bicycle accident, as the girl originally stated to a physician. *Id* at 479-480. Despite being provided a copy of the doctor's report relating to the girl's statement about the bicycle accident and a list of at least 12 people who were potential witnesses as to the bicycle accident, trial counsel failed to investigate and substantiate his client's defense.

The Court held that "counsel's failure to investigate and substantiate defendant's primary defense was not a strategic decision, erroneous only in hindsight. It was a fundamental abdication of his duty to conduct a complete investigation, and it restricted his ability to make reasonable professional judgments and put forth his case. As a consequence, Defendant was deprived of a substantial defense and of the effective assistance of counsel." *Id* at 480.

The *Grant* Court recognized that a "reviewing court must not evaluate counsel's decision with the benefit of hindsight. *Strickland* [*v. Washington 466 US 668, 689; 104 S Ct 2052 (1984)*]. On the other hand, the court must ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution." *Id* at 485. The court added :

> [S]trategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limits on investigation … [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* supra at 690-691
>
> The defendant must show also that this performance so prejudiced him that he was deprived of a fair trial *Pickens,* supra t 338. To establish prejudice, he must show a reasonable probability that the outcome would have been different but for counsel's errors. *Strickland,* supra at 694. A

> reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different. *Id* at 693. "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. *Grant, supra,* at 485-486

In the present case, trial counsel admitted that he should have both interviewed and brought evidence of the numerous family members and friends to testify that they were physically present in the trailer during the narrow time frame of a couple of weeks during which the act of sexual penetration allegedly occurred. The trial court's statement that because these were family members and/or friends they must be "biased" was a decision for the jury, not the court. In *Grant*, moreover, the twelve people were associated with the girls or defendant as witnesses. *Id* at 482. It would be unusual, in fact, for the trailer where defendant resided to house anyone other than family members or close friends.

During oral argument in the lower court, defendant in the present case argued that a "trial strategy born of ignorance is not a trial strategy." *Ginther Hearing* at 201. As the *Grant* court stated, "here, counsel did not interview half of the people whom defendant identified as having potentially helpful information. He did not know what testimony these witnesses would give. He did not know where they had been or what they had seen. *Grant, supra*, at 493.

In the present case, Defendant was prejudiced by his counsel's (1) failure to investigate his defense that no act of sexual penetration occurred in the trailer where he resided and (2) failed to present any witnesses who, because of their constant presence at the trailer, were in a position to observe an act of forcible sexual penetration. None of those witnesses was listed, interviewed, or produced at trial to present a defense. Because prejudice to the defendant has been established, a new trial must be ordered.

The People contend that trial counsel could ignore witnesses who would have testified that defendant and the complainant were never left alone because it countered his strategy

challenging the credibility of the complainant. Instead of an "alternate" trial strategy, however, calling these witnesses was consistent with the approach that trial counsel should have taken, but didn't, to the detriment of his client. *Ginther Hearing* at 163-164; Attachment 1.

The People wrongly treat the defense's challenge of the victim's credibility and the calling of defense witnesses from the trailer as mutually exclusive strategies when, in fact, they would have served the same purpose. Trial counsel never challenged the victim's credibility when she testified that she was home alone with defendant during an act of penile-vagina penetration. *Ginther Hearing* at 137-138. Nor did he challenge her credibility about possible blood on the Aunt's bed by calling the Aunt. *Ginther* Hearing at 177-179; Attachment 2.

Appellant's ineffective assistance claim relates to the act of penile-vaginal penetration in Count I-Criminal Sexual Conduct-First Degree of the Complaint. This was alleged to have occurred in January, 2013 in the bedroom of defendant's aunt at the trailer where he resided. TI 110-114. At the preliminary examination and trial, complainant testified that she and the defendant were alone at the trailer where defendant and many others resided. PT 26-27; TI 111.

The claim of ineffectiveness does not encompass various sexual contacts that formed the basis of criminal sexual conduct in the second degree in Count II.[‡] The People's argument that a different act of sexual contact occurred in *complainant's* trailer while others were present is irrelevant to the conviction for first degree sexual penetration that occurred where the defendant resided. The proposed witnesses were not offered for conduct that occurred outside the January/February, 2013 time frame or the defendant's trailer.

Trial counsel used an approach that complainant was lying because she was angry and felt abandoned because her uncle had announced he was engaged and having a baby. TI 143-144; TII 100-102. At the *Ginther* hearing, trial counsel did not feel this was a good theory or very

[‡] Following sentencing, the prosecution dismissed Count II with prejudice. *Sentencing Transcript* at 6-7.

persuasive. *Ginther Hearing* at 156, 171. There is nothing to indicate that counsel believed this only in hindsight. *Id.* He also challenged the credibility of the complainant by pointing out inconsistencies in her testimony, as restated in his closing argument. TII 104-105.

Defense counsel failed, however, to use the most readily available and effective approach to challenging the credibility of the complainant: calling witnesses who lived in the trailer to contradict the complainant's testimony that she was home alone with the defendant when the act of sexual penetration occurred, especially during the crowded dinnertime. TI 111-112; *Ginther Hearing* at 56-57, Defendant's Exhibit J. Defense counsel readily admitted that he should have both investigated and produced those witnesses at trial. *Ginther Hearing* at 163-164; See Attachment 1. He conceded that he did not do this and it is undisputed that no witnesses were produced to rebut the complainant's testimony that the act of forcible sexual penetration occurred when she and defendant were alone or that it occurred. *Ginther Hearing* at 44, 187-188. Presenting the witnesses who lived in the trailer during the time period in question would have challenged her credibility that they were alone. Presenting the numerous defense witnesses in the trailer would have (1) challenged the complainant's credibility in that regard and (2) provided testimony that an inherently violent and forcible act of sexual penetration could not have gone unnoticed in a bedroom of the trailer where the door would not shut. *Ginther Hearing* at 31.

Trial counsel also failed to call a key witness to testify about the presence or absence of blood on the linens. One of the proposed defense witnesses not called, Alicia Garcia, in whose bedroom the rape allegedly occurred, testified that she never observed any blood on the linens of her bed. "I would have noticed something if there was something on the bed." *Ginther Hearing* at 44. This testimony would have contradicted the complainant's testimony at trial that after the sexual penetration, she was bleeding and could have left some blood on the bed. TI 116, 171-172; Attachment 2. The nonexistence of blood on the bed where the rape occurred would have

been a significant and compelling issue before the jury. As it stood, complainant's testimony was left unrebutted.

People v. Johnson, 451 Mich 115; 545 NW2d 637 (1996) supports Appellant's claim of ineffective assistance of counsel. In *Johnson,* the defendant was accused of shooting a man outside of a bar. The prosecution produced a witness who saw defendant shoot the deceased. The defense offered testimony from the bar owner and defendant's father that the deceased was shot by a person while he was shooting at defendant. *Id.* at 117. The Court reversed defendant's murder conviction on the ground that trial counsel was ineffective in failing to call six witnesses who would have testified that defendant did not shoot the victim. Four of the witnesses informed the trial attorney of this information. *Id*. at 119. Trial counsel "offered no explanation for failing to call the witnesses." *Id*. at 120. The Court stated that "it is quite significant that the defendant has located *six* supporting witnesses." *Id.* at 122 (emphasis in original).

Although noting that the father and tavern owner already testified similarly to the additional witnesses, the Court stated that "the exculpatory evidence not presented to the jury is so substantial that we agree with the Court of Appeals that it could have changed the outcome of the trial." *Id.* at 121, 124. Further, the Court found that there was "no sign that counsel made a strategic decision not to call the six witnesses to testify regarding the events that occurred on the night of the shooting." *Id*. at 122. Accordingly, the Court held that defendant established that the performance of his counsel was deficient and that it prejudiced the defense to the extent that his client was deprived of a fair trial with a reliable result. Defendant overcame the presumption that the challenged action was trial strategy and showed a reasonable probability that, but for the counsel's mistakes, the result would have been different. *Id.* at 124.

The People contend that the witnesses would have merely established that the defendant did not do a certain thing. However, in *Johnson* the witnesses were testifying as to a negative,

that is, they either did not see the defendant shoot the victim or could not determine that he shot him. *Id.* at 119. At the *Ginther* Hearing, the testimony established that it would have been improbable for an act of forcible sexual penetration, as described by the complainant, to occur in such a setting unnoticed.

The six supporting witnesses who could testify that defendant and the complainant were never alone in the trailer presented compelling testimony to rebut complainant's story that she and defendant were alone when the act occurred. Second, these witnesses were not cumulative to any other witness. Although the People suggest that the additional witnesses at the *Ginther* Hearing were cumulative to some other witnesses, it does not identify them. Presumably, the People are referring to the complainant; however, whatever the cross examination by trial counsel, the complainant can hardly be construed as a defense witness. On top of that, the complainant testified that she was alone with the defendant, a fact directly contradicted by all six witnesses who were living in the trailer at the time. Thus, the proposed witnesses were not cumulative to any other witness and not cumulative to any other defense evidence as no one testified as to the crowded living conditions of the trailer.

It is improbable that a forcible rape in such a confined area with so many people present near a room whose door could not be shut, let alone locked, would have occurred unobserved or unheard. *Ginther Hearing* at 31-32. By the People's own reckoning, and his testimony, trial counsel was aware of the crowded conditions and the fact that numerous people lived there. Oblique references from the complainant and ineffective cross examination of the state trooper about not producing such witnesses establish two points: (1) the importance of such testimony to the defense and (2) the failure of trial counsel to present the issue directly in front of the jury. The People strive to graft a "trial strategy" regarding these failures on the defense; however, it is clear from counsel's testimony that he failed to give the evidence due consideration and admitted

that he should have produced the witnesses in any event. *Ginther Hearing* at 155-156; Attachment 1.

Absent from the People's argument is any reference to Alicia Garcia's *Ginther* testimony rebutting the complainant's testimony that defendant sexually penetrated her on Alicia's bed. Because complainant testified that she was bleeding after this penis-to-vagina penetration, it is entirely reasonable, indeed probable, that bleeding resulted at the site where the penetration occurred. Forcible sexual penetration of a 12-year-old by a 17-year-old, like a stabbing, would, based on common sense, result in blood flowing immediately. In any event, complainant testified that there could have been blood on the bed. TI 172. Alicia's testimony that she saw no bloodstains on her lightly colored linens in her own bed directly contradicts a damning piece of evidence in the case. *Ginther* Hearing at 44. It is undisputed that trial counsel did not interview Alicia or any of the other potential witnesses living at the trailer, with the exception of Eleazar Garcia (the mother of defendant) and Alejandra Garcia (a sister of defendant), none of which focused on the conditions or population of the trailer. *Ginther* Hearing at 91-92; Attachment 2.

The People concede that defense counsel "was in contact with the family, and specifically, family members who lived at the trailer. He knew the crowded living situation and the 'difficulty of this occurring with him being so close and the crowded nature of the family living situation.'" *Appellee's Brief on Appeal* at 27; *Ginther Hearing* at 93. Trial counsel was aware at the preliminary exam that complainant testified that she was alone with defendant and that she bled as a result of the sexual intercourse. PT 26-27; PT 33. This could have been exploited by defense counsel had he interviewed those living in the trailer where the crime occurred and asked obvious questions about what had occurred or did not occur in the narrow time frame during which the sexual intercourse was alleged to have happened.

After failing to distinguish *People v. Johnson* from the present case, the People seek to

apply *People v. Carbin*, 463 Mich 590; 623 NW2d 884 (2001). This fails as well because *Carbin* is clearly distinguishable. In a non-jury trial, the defendant was convicted of first degree criminal sexual conduct. *Id*. at 594. The victim positively identified the defendant as he had come to the crime scene before and she remembered him. Defendant's trial counsel produced one alibi witness who testified that defendant was involuntarily committed to the Detroit Psychiatric Hospital, a secure facility with locked doors leading in and out. *Id*. at 593. However, there was a small window of opportunity where the defendant's whereabouts could not be positively accounted for. The security at the facility was also not absolute. It was claimed that counsel was ineffective for not producing two additional witnesses from the hospital who could testify about the location of the defendant and the level of security when the crime was committed. *Id*. at 595. The Court held that there was no ineffectiveness because the additional witnesses were "essentially cumulative" of the original testimony produced by the defense. The additional witnesses added nothing about where defendant was when the crime occurred. *Id*. at 597, 601-602.

In describing the *Carbin* holding, the People state an incorrect standard of review:

> Unlike in *Johnson*, the witnesses [in *Carbin*] did not offer further persuasion, and counsel's performance would have fallen '"below that which would be expected of an attorney of ordinary training and skill in criminal law' only if she had presented 'no testimony at all' regarding defendant's alibi." *Id.* at 597. *Appellee's Brief on Appeal at 23-24*

However, the *Carbin* court rejected that standard, stating as follows:

> 6. In making this determination, the trial court relied on the standard set forth in *People v. Garcia*, 398 Mich 250; 247 NW2d 547 (1976). That standard was rendered obsolete by *People v. Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Carbin, 463 Mich at 597 n 6. Two distinguishing features of *Carbin* stand out. First, the two additional witnesses were clearly cumulative of the trial witness. In the present case, no defense

witnesses were called to testify about living conditions, the cramped trailer, or the fact that defendant and the complainant were never seen alone during the time frame in question. *Ginther Hearing* at 163-164. No defense witness was called about the lack of any blood on Alicia Garcia's bed linens. Second, the trial judge in *Carbin* sat as the trier of fact and assessed credibility that led to the verdict of guilty. Thus, he was in a unique position to determine whether or not the addition of the witnesses would have resulted in a different outcome at the trial. He found the victim "very believable." *Carbin*, 463 Mich at 604. In the present case, the trial judge made no finding, or even comment, about the credibility of the complainant, nor did she project any finding that the jury might have made about her credibility. *Johnson* did not assess credibility of the witnesses, just what they had to say. *Johnson*, 451 Mich at 122-123.

In *People v. Dixon*, 263 Mich App 393; 680 NW2d 308, 311 (2004), the Court stated that the pre-trial period constitutes a "critical period" because it imposes a constitutional duty on trial counsel to investigate the case. *Mitchell v. Mason*, 325 F3d 732, 743 (6th Cir. 2003). The Court reversed the convictions of first degree criminal sexual conduct and other felonies for the denial of effective assistance of counsel. Counsel failed to lay the proper foundation for the admission of a 911 call of complainant and failed to file a notice of intent to introduce prior consensual sexual conduct between complainant and the defendant. *Id.* at 311-312. The Court held that counsel was not ineffective for failing to call defendant to raise the issue that the sexual conduct with complainant was consensual. Failure to call witnesses is ineffective "if it deprives the defendant of a substantial defense." *Id.* at 311-312. However, the Court found that defense counsel did raise the defense of consent by cross examining the complainant on that issue and challenging her credibility. *Id.*

In the present case, trial counsel did not offer witnesses to challenge complainant's testimony that she and defendant were alone during the forcible rape at his trailer. He also did

not present evidence or witnesses to the effect that there were no bloodstains on the bedsheets where Alicia Garcia slept (and was present virtually around the clock). Despite having clear evidence and witnesses at hand pertaining to the conditions at the scene of the crime and numerous witnesses able to challenge the credibility of the complainant, trial counsel did not investigate or produce them. *Ginther Hearing* at 157-158. Failure to present this exculpatory evidence through testimony of readily available witnesses and otherwise describe the scene at the trailer was a denial of effective assistance of counsel. *Johnson,* 451 Mich at 122.

This was the same conclusion reached in *People v. Grant,* 470 Mich 477, 486; 684 NW2d 686 (2004), in which the Court rejected the argument of the prosecutor that cross examination of the victim alone was sufficient when many witnesses were available to directly refute her testimony. The present case was a credibility contest which featured, as it unfortunately turned out, damning physical evidence pertaining to the adult speculum raised in issue II of the Reply Brief and issue III (C) of Appellant's Brief on Appeal. Failure to interview witnesses resulted in counsel's ignorance of valuable evidence which would have substantially benefited defendant. *People v. Caballero*, 184 Mich App 636, 642; 459 NW2d 80, 82 (1990).

There is nothing in the *Ginther* Record to establish that, as the People contend, trial counsel consciously "chose to go with a different strategy at trial." *Appellee's Brief on Appeal* at 27. Rather, trial counsel admitted that he made mistakes. *Ginther Hearing* at 95-96, 157; Attachments 1-3. Producing the witnesses was supportive of, not a barrier to, the strategy of contesting complainant's credibility. The People offer contradictory justifications for his not producing the witnesses. On the one hand, they argue that trial counsel properly raised the issue of the missing witnesses and description of the scene of the crime by cross examining the state trooper, but excuse counsel's failure to interview family members or to visit the location of the crime himself. The People's contentions are an after-the-fact strategy, using hindsight to excuse

the ineffectiveness.

C. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO INTERVIEW A KEY MEDICAL WITNESS RESULTING IN PREJUDICIAL EVIDENCE ABOUT AN ADULT SPECULUM TO BE HEARD BY THE JURY

Standard of Review: See Argument (B) *supra*.

Under standard of review of the following paragraph, the Court of Appeals erroneously held that the Defendant failed to demonstrate the trial counsel's failure to interview the Physician's Assistant constituted ineffective assistance of counsel. Court of Appeals Opinion at 5-6. The record again establishes that trial counsel admitted that he should have tried to interview the Physician's Assistant and that it was indeed, as the prosecutor put it during closing argument, a "huge mistake" not to do so as he was wholly unprepared for the extremely damaging testimony that she testified to and elicited by *defense counsel* during cross examination. The Court of Appeals and trial court grafted a trial strategy onto defense counsel where none existed to reach the conclusion that he was not prepared for this key witness.

In fact, trial counsel was grossly unprepared for the testimony that the Physician's Assistant gave on the witness stand, despite having the opportunity with medical records to interview the Physician's Assistant. Second, and key to Defendant's argument, that the physician-patient privilege had been waived by the release of the medical records to the parties and the acknowledgement by the Physician's Assistant under oath on the witness stand that there was no physician-patient privilege in effect. Both courts have it backwards by arguing that there is no evidence that the Physician's Assistant would have talked to trial counsel. This has the burden reversed. Trial counsel acknowledged that he made no effort to try to find out what the Physician's Assistant would testify to on the witness stand, as so poignantly indicated by the prosecutor in his devastating closing argument detailing all the reasons why this was indeed a

huge mistake by counsel. Indeed, during the testimony, the Physician's Assistant was anything but reticent, offering testimony in response to a loose and open ended question by defense counsel on cross examination that she examined the victim with an adult speculum that fit very easily into the vagina of the victim. The Physician's Assistant repeated this, incredibly, on further examination by trial counsel and remarked how highly unusual it was that the speculum could fit inside a 12 year-old so easily.

Thus, in a case in which there was no physical evidence presented to the jury to establish the elements of the criminal offense, trial counsel opened the door to highly damaging testimony from the victim's own treating healthcare professional that certainly tipped the balance against the Defendant. Defense counsel compounded the error by asking a question again and allowing the Physician's Assistant to elaborate on her earlier surprise testimony. Had trial counsel interviewed the Physician's Assistant and discovered any facts about the adult speculum, he could have refused to insist on her presence, which he instigated with a late discovery motion, or at least tightly controlled the questions on cross examination to prevent such testimony. Secondly, defense counsel could have simply subpoenaed the Physician's Assistant to the Preliminary Examination and discovered all of the testimony pertaining to her physical examination of the victim that occurred on December 5, 2013.

In dismissing the responsibility of defense counsel to at least attempt to interview such an important witness, the lower court's excuse trial counsel from even a minimal duty to find out significant facts before her attendance.

The trial court concluded that trial counsel's failure to interview Physician's Assistant Gene Lafever was not deficient. *July 9, 2015 Decision* at 16-18. Defendant contends that trial counsel failed in his duty to interview this key witness. This witness testified as to the only physical evidence in the case and was clearly a tipping point in terms of the credibility contest

between the complainant's accusations and the defense of denial. Although conceding that an attorney has a duty to investigate potential defense witnesses, the trial court excused trial counsel from the elementary task of interviewing the physician's assistant by stating that he need not interview every witness that is listed in a police report.

The court characterized the physician's assistant as an "independent witness who has produced either a benign report or one favorable to the defense…." *Id* at 17-18. In the next paragraph, however, the trial court contradicted itself by stating that trial counsel believed the physician's assistant to be "favorable to the prosecution because she was the victim's doctor and that he didn't think she would talk with him." She also described, without any evidence, that Ms. Lafever had a pro-prosecution bias and that she was "tight-lipped" in her words.

If trial counsel believed that the witness was in fact pro-prosecution, that would have been a red flag to make sure this witness was interviewed before trial. Further, it was defense counsel, not the prosecution, that sought out this witness and her medical records to present to the jury. *See September 5, 2014 Pretrial Hearing* at 11-12, 14-16. Clearly, interviewing this witness was essential to a proper defense of the case as she was not merely one of many witnesses in a police report but the person who performed the only medical examination of complainant that existed. *See* police report at Exhibits P and Q; medical records at Defendant's Exhibit R.

Despite the release of the medical records, Margolis believed that there was no waiver of the physician-patient privilege. *Id* at 173. Margolis conceded that if the physician's assistant had put something in a report about the speculum, he would, as a matter of trial strategy, have stayed away from it or found an expert to tell the jury why that was not unusual. *Id* at 173-174. He then testified:

> THE WITNESS: And I tried to be the expert, if you remember, during the trial.

> THE COURT: Okay.
>
> THE WITNESS: Not my finest moment, as the jurors told me at the end that I know nothing about the female anatomy, but -- and she did admit that everybody is different, everybody's bodies are different, you don't know why, whatever, but, you know, as Mr. Burhans says, it probably just hammered it home that, you know, this was there and I was afraid of it, you know, but that's not going to win the day either. *Id at 174.*

Margolis, having just agreed that the physician's assistant, would be an "independent witness" testified that he didn't think the physician's assistant would have talked to him, commenting "I think she would have been very circumspect and very tight-lipped about what she was saying." *Id* at 174. The court then used that as "an example of how witnesses can be dangerous on the stand?" with which Margolis agreed. *Id* at 175. On the other hand, Margolis did agree that there was no risk in interviewing the physician's assistant. Second, he never knew that she would not talk to him. He agreed that the notion that she might not like him as a member of the defense was speculation. *Id* at 176. Margolis also agreed that the physician's assistant was not just another name in the police report but an important witness that had caused him to file a motion to produce the records for an in-camera review by the court. *Id* at 176. He testified in this regard:

> I was more concerned with not missing something that may be helpful to me and, you know, maybe now in retrospect, I look at it as, I don't want the Court to be upset with me, but a little bit of a lack of experience trying this type of CSC. *Id* at 176-177.

Margolis also could have subpoenaed the physician's assistant to testify at the preliminary examination.

Without any support in the record, the trial court found that had trial counsel tried to interview the witness in preparation for cross-examination, she would have (a) refused to talk to him, and (b) lied about the adult speculum. This is pure speculation on the part of the trial court. *Ginther* Hearing at 176. The undisputed fact remains that trial counsel made no attempt to

interview this key witness and was caught by surprise by the speculum testimony. The court's conclusion that the witness's testimony was "spontaneous" is also pure speculation. Failure to interview Ms. Lafever was not a trial strategy but a mistake – "a huge mistake" in the words of the prosecutor during the closing argument – that led to devastating testimony against the Defendant and prejudiced the outcome of the trial.

Defendant incorporates the arguments made under Section B of the argument above. A sound trial strategy must be implemented "in concert with an investigation that is adequately supported by reasonable professional judgments." *Grant, supra* at 486. Further, an attorney must make "an independent examination of the facts, circumstances, pleadings and loss involved…." *Von Moltke v Gilles*, 332 US 708, 721; 68 S Ct 316 (1948) "all leads relevant to the merits of the case" must be pursued to fit what would otherwise be a sound trial strategy. *Blackbird v. Foltz,* 828 F2d 1177, 1183 (6th Cir 1987).

It is undisputed that trial counsel did not interview Gene Lafever, the physician's assistant who examined the complainant on December 10, 2013. *Ginther Hearing* at 112-113; Attachment 3. Applying the same constitutional standards for failing to properly investigate a case and interview witnesses as set forth above, it is clear that trial counsel's performance was deficient and prejudiced his client in front of the jury. Trial counsel filed a motion before the trial court specifically seeking medical records from Lafever in anticipation of cross examining her at trial. He also knew that the physician's assistant would most likely be sympathetic toward the complainant as she was her regular doctor. These facts alone should have provided a red alert to trial counsel that he had to interview her to ensure that there were no surprises at the trial.

There is no "rule" or professional standard which supports the People's argument (or the trial court's opinion) that an attorney should rely upon a report alone of an expert pertaining to all aspects of a physical examination of a patient. *See* Defendant's Exhibit Q admitted at the

Ginther hearing. Both the prosecutor and the trial court seek to excuse trial counsel from neglecting to interview the physician's assistant by guessing that she would not talk to him and implying that she would distort what her report had to say. This is pure speculation. *Ginther Hearing* at 176. This was not, as the People assert, a situation where "these witnesses generate large volumes of reports for various cases and therefore their memory of an event detailed months or years earlier is reliant upon their report." *Appellee Brief on Appeal* at 32. Lafever's report was about a forcible rape case involving her own patient, something not likely to be forgotten between the 12/10/2013 Examination and the criminal case filed a couple of months later. Second, the report could only be admitted by Lafever herself, absent a stipulation of which there was none. Thus, it was clear that both parties anticipated that this witness testify at trial.

Both the deficiency of the trial counsel's performance and the prejudice resulting from that deficiency is best summarized by the prosecutor during his closing argument. The prosecutor described defense counsel's performance as "a huge mistake" leading to the disclosure of one of the most damaging and prejudicial comments made during the trial: the physician's assistant's testimony about how unusual it was for an adult speculum to fit so easily into complainant's vagina during her examination. TII 123-124. During the *Ginther* Hearing, trial counsel agreed that it was a huge mistake not to interview the physician's assistant, resulting in catastrophe for defendant. *Ginther Hearing* at 121-123. Neither the prosecutor nor the trial court addressed this glaring omission at the *Ginther* Hearing. In like manner the People ignore it on their Brief on Appeal. After the prosecutor made such an exhibition of the ineffectiveness in counsel in closing argument, however, the jury clearly did not ignore it.

D. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE HEARSAY TESTIMONY OF THE PHYSICIAN'S ASSISTANT IDENTIFYING DEFENDANT AS THE PERPETRATOR

Standard of Review: See Argument (B) *supra.*

MRE 803(4) provides:

> The following is not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
> (4) Statements made for purposes of medical treatment or medical diagnosis in connection with the treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The Court of Appeals held that the identification testimony by the Physician's Assistant of the Defendant in her physical examination of the victim was admissible under MRE 803(4). Thus, according to the Court, any objection to her testimony would have been meritless and not in effective assistance of counsel. Court of Appeals at slip opinion at 7. While conceding that the "sole issue at trial was the victim' credibility and whether she fabricated her story", the lower courts failed to recognize the significance of a treating physician identifying the Defendant through the hearsay testimony related to her by her patient. Because there were no other witnesses presented on either side to support or contradict the victim or Defendant (see sub-parts B. and C. above), this testimony further tipped the balance in favor of the prosecution. There was thus a reasonable plausibility that a different outcome would have occurred but for this and the other errors.

In *People v. Meeboer (After Remand),* 439 Mich 310, 312; 484 NW2d 621 (1992), the Court stated that the "rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians and in order to receive proper medical care,

and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." Factors that may be part of a trustworthiness analysis include:

> (1) The age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination(statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. *Id.* at 324-325.

Applying the *Meeboer* factors to the present case does not support admission of the victim's statements and should have been objected to at trial or preferably in a motion in limine. At the time of the examination, the complainant was only 12 years old. She was present with her mother, who appeared to relay most of the information in adult terminology. The examination was initiated **after** reports by the complainant to the school counselor, the Department of Human Services and the Michigan State Police. The clear inference is that the doctor's visit was prompted by those reports as they occurred less than a week after they were made.

As far as the timing of the examination, there was no evidence that the complainant was then suffering from any physical ailment. The acts of alleged sex abuse occurred many months beforehand. The examination took place on the same day as the interview by the Michigan State Police of the complainant. The physical examination was to make sure that the complainant was healthy and had no sexually transmitted diseases, none of which required the identification of the perpetrator, in terms of a necessity for medical treatment. It is undisputed that the complainant was the niece of the person she identified, defendant. The defendant contends that she had a motive to fabricate, having failed to identify the defendant at any point before the December 5,

2013 report or thereabouts. Because the incident had already been reported to the school, government agencies and police, there was no need for the physician to fulfill any reporting requirements.

In *People v. Mosko*, 190 Mich App 204, 206-208; 475 NW2d 866 (1991), *reversed on other grounds*, 441 Mich 496 (1992), the Court found that similar statements by a physician about what the abused patient had told her was inadmissible. In that case, she told the physician that she had been followed and raped on repeated occasions by one person. The physician did not name the person. The medical examination occurred at least three months after the abused patient disclosed the alleged abuse. The Court relied on *People v. LaLone*, 432 Mich 103; 437 NW2d 611 (1989) in which the Supreme Court held that the statements to the psychologist were inadmissible because they were not made in connection with medical treatment "when they were made after the initial investigation into the allegations of abuse had been launched." The conviction of first degree criminal sexual conduct was reversed for a new trial as a credibility contest was involved.

The trial court found no substandard performance on the part of trial counsel in failing to object to the hearsay testimony of the physician's assistant in which she quoted the complainant as identifying the Defendant as the person who had "raped her." TI 218.

The trial court ruled that the failure to object by trial counsel was neither deficient nor prejudicial. Defendant contends that both were evident. Treatment for medical diagnosis before a criminal investigation has commenced is a well recognized exception to the hearsay rule. However, after the criminal justice system has commenced, the use of hearsay statements becomes much more problematic and suspect. In the present case, the trial court never recognized the timing of when the investigation began. Because the physician's assistant herself

recognized that an investigation had already begun, it was improper to allow the hearsay testimony of complainant's doctor identifying the Defendant.

The trial court curiously ruled that because the *complainant* had already identified the Defendant, then an additional identification by her physician's assistant was merely cumulative. *Id* at 15. This misunderstands the nature of the close credibility contest between the complainant and the defense challenging her credibility, not to mention the power of a doctor testifying. Thus, not only did the physician's assistant testify that her patient had been sexually penetrated due to the ease with which she could insert the adult speculum, but she also identified the defendant as the one who penetrated her. Both aspects of the testimony severely prejudiced the defense as it bolstered the identification of the complainant and provided clear physical evidence that the prosecutor exploited in his closing argument. *See* page 15 *supra*.

CONCLUSION

For the reasons and authorities set forth above, Defendant respectfully requests that this Court vacate the conviction and sentence and remand the case to the trial court for a new trial.

Dated: May 10, 2016

/s/John T. Burhans
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